

DATE: November 29, 2007

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 07-03253

**DECISION OF ADMINISTRATIVE JUDGE
MICHAEL H. LEONARD**

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 24-year-old systems engineer. Security concerns are raised by his marijuana use and related personal conduct. His last use of marijuana was in August 2005 while overseas on vacation. Applicant successfully mitigated the security concerns because (1) his marijuana use is not recent, (2) he intends not to abuse any drugs in the future, (3) his history of marijuana use is relatively minor and insignificant, and (4) his related personal conduct no longer makes him vulnerable to exploitation, manipulation, or duress. Clearance is granted.

STATEMENT OF THE CASE

This is a security clearance case. Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on July 10, 2007. The SOR is equivalent to an administrative complaint and it details the factual basis for the action. The issues in this case fall under Guideline H for drug involvement based on marijuana use and Guideline E for personal conduct related to his marijuana use.

In addition to the Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.² The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

On August 3, 2007, Applicant replied to the SOR and requested a hearing. The hearing took place as scheduled on November 14, 2007, and the transcript was received on November 26, 2007.

FINDINGS OF FACT

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a, 1.b, 2.a, and 2.b. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 24-year-old systems engineer who is employed by a company engaged in defense contracting. He has not married and he has no children. This is his first post-college job, and he started working for the company in September 2005. He is seeking to retain a security clearance.

Applicant admits to past marijuana use approximately five or six times, the most recent of which was August 2005. He used it twice in the U.S., once in high school and once in college. He used it three times on trips to Amsterdam in 2002 and 2005.

During 1997–2001, Applicant attended high school. He graduated high school in May 2001, and started college that fall. He earned a bachelor's of science degree in systems engineering in May 2005.

Applicant worked as a college intern for a defense contractor from May 2003 to about May 2005. For this employment, he completed a security-clearance application in June 2003 when he was

¹ Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).

² See Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

about 20 years old. He reported in the application that he had used marijuana on two occasions during the period of October 1999 to March 2003 (Exhibit 1). Based on his application, a background investigation was conducted, which included an interview with Applicant in June 2004. In his written statement, he admitted the previously disclosed marijuana use and characterized it as experimentation (Exhibit 2 at p. 4). Also, he disclosed that he used marijuana twice while on vacation in Amsterdam in 2002. He explained he did not disclose his 2002 marijuana use in his security-clearance application because he understood that it was legal to use marijuana in Amsterdam. He further indicated that he did not intend to use marijuana again based on the effects of using it in Amsterdam.

In April 2005, Applicant completed an employment application for his current employer (Exhibit 3). Although he was offered a full-time position with the company that he interned with, he was unhappy with them and wanted to relocate to another area of the country. In the application, he indicated that he had been granted a secret-level security clearance in August 2004. Along with completing the application, he also completed a pre-employment drug screening consent form wherein he agreed to submit to drug testing (Exhibit 3 at p. 7).

Applicant took the summer off after graduating from college to travel around the United States and Europe. His travels led him back to Amsterdam in August 2005 when he used marijuana for the last time with two acquaintances.

He started his current employment on September 12, 2005. According to company's personnel security office, Applicant had been in contact with that office before his start date concerning his marijuana use in Amsterdam (Exhibit A). Several days after starting work, he completed another security-clearance application, apparently to upgrade from secret to a top-secret clearance (Exhibit 4). In response to the relevant question, he disclosed that he used marijuana five times and made the following additional comments:

Experimentation, used a couple of times in the US and a couple of times in Amsterdam. Also, although it is legal to smoke in Amsterdam, I should note that I did regrettably smoke once on my last visit to Amsterdam on 8/10/05 (Exhibit 5 at p. 43 of 47).

The agency issued interrogatories to Applicant, to which he responded in April 2007 (Exhibit 5). He indicated he had used marijuana a total of six times from October 1999 to August 2005. He denied possessing any drugs or drug-related paraphernalia. He denied any intention to use marijuana in the future.

Applicant is performing well in his job as a systems engineer (Exhibits A, B, and C). Indeed, in May 2006, he was nominated for participation in a company engineering leadership development program (Exhibit C). In a memorandum supporting the nomination, Applicant's then manager described him as "an extremely bright, energetic and conscientious worker" with "enormous potential that needs to be developed and exploited" (Exhibit C at pp. 1-2). Although he was not selected for the program based on this nomination, he has since been selected for it. Applicant intends to further his education and career goals by obtaining an MBA.

In his hearing testimony, Applicant addressed the circumstances surrounding his marijuana use. Concerning the August 2005 use in Amsterdam, he considers it a “stupid decision” (R. 73). He is now headed in a different direction in his life with a focus on professional success. He does not associate with the two acquaintances from the Amsterdam incident. He has two roommates and, as far as he knows, neither roommate is involved with marijuana. Finally, Applicant submitted a signed statement wherein he agreed that he would not use, traffic, or distribute any controlled substance regardless of any local codes or laws permitting this behavior, and he acknowledged that his failure to comply with his statement will result with automatic revocation of any security clearance held by him (Exhibit D). Also, he agreed to submit to professional evaluation or counseling as well as drug testing.

GENERAL PRINCIPLES OF LAW AND POLICIES

No one has a right to a security clearance.³ As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁴ A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁵ An unfavorable decision: (1) denies any application; (2) revokes any existing security clearance; and (3) prevents access to classified information at any level and retention of any existing security clearance.⁶ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁷ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁸ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁰ In *Egan*, the Supreme Court said that the burden of proof is less than the preponderance of the evidence.¹¹ The

³ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (“It is likewise plain that there is no ‘right’ to a security clearance, so that full-scale due process standards do not apply to cases such as *Duane*’s.”).

⁴ *Egan*, 484 U.S. at 531.

⁵ Directive, Enclosure 3, ¶ 3.2.

⁶ Directive, Enclosure 3, ¶ 3.2.

⁷ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁸ Directive, Enclosure 3, ¶ E3.1.14.

⁹ Directive, Enclosure 3, ¶ E3.1.15.

¹⁰ Directive, Enclosure 3, ¶ E3.1.15.

¹¹ *Egan*, 484 U.S. at 531.

agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹²

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.¹³ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

CONCLUSIONS

Under Guideline H for drug involvement,¹⁴ a security concern may exist based on illegal drug use or misuse of a prescription drug. Either "can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations."¹⁵

Here, based on the record evidence, a security concern is raised by Applicant's history of marijuana use. Starting in October 1999 (when he was 16 years old) and ending in August 2005 (when he was 22 years old), Applicant used marijuana five or six times. Plainly, his use of marijuana in the U.S. was illegal and supports a conclusion that Applicant engaged in drug abuse.¹⁶ In addition, Applicant aggravated the situation by using marijuana in 2005 after he submitted a security-clearance application in 2003 and after a clearance was granted in 2004.¹⁷ The concern here is that Applicant's history of illegal marijuana use is indicative of irresponsible behavior, poor judgment, and it calls into question his willingness to follow laws, rules, and regulations.

The four mitigating conditions under Guideline H have been considered and two apply in his favor. His marijuana used ceased more than two years ago, which is not recent. And it took place a

¹² ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹³ Executive Order 10865, § 7.

¹⁴ Revised Guidelines at pp. 17–18 (setting forth the disqualifying and mitigating conditions).

¹⁵ Revised Guidelines at p. 17.

¹⁶ DC 1 is "any drug abuse." *See generally* U.S. Department of State Background Note: The Netherlands, in which it discusses the country's domestic drug policy, available online at the State Department's Web site (the Dutch Opium Act punishes possession, commercial distribution, production, import, and export of all illicit drugs, however, drug use is not an offense).

¹⁷ *See* DC 7 is "any illegal drug use after being granted a security clearance."

mere five or six times, which is infrequent. Both these circumstances support a conclusion that further marijuana use is unlikely to recur. Accordingly, MC 1¹⁸ applies in his favor.

In addition, Applicant has demonstrated his intent not to use marijuana in the future based on the following: (1) he has abstained from marijuana use for more than two years; (2) his marijuana use was infrequent; (3) he has affirmatively stated his intention to abstain from marijuana use as it is inconsistent with his professional plans and goals; (4) he signed a statement of intent to abstain with automatic revocation if he used drugs in the future; and (5) he has been candid and truthful with the government by disclosing his marijuana use. Given these circumstances, MC 2¹⁹ applies in his favor.

Although Applicant's marijuana use raises a security concern, it needs to be put in perspective. The agency appeal board has affirmed the granting of security clearances in cases involving applicants with long-term or significant histories of marijuana involvement. For example, in 1998, the appeal board affirmed a favorable decision for a 41-year-old applicant with a 24-year history of marijuana use, who had used marijuana during his military service, and who had used marijuana for several years after being granted a security clearance.²⁰ Then in 1999, the appeal board affirmed a favorable decision for a 37-year-old applicant who started using marijuana at a party in 1996 and used marijuana one to two times daily for three months in 1998.²¹ Then again in 1999, the appeal board affirmed a favorable decision for a 28-year-old applicant who smoked marijuana nine months before the record closed, who smoked marijuana over a ten-year period, and who smoked marijuana while working as a security professional in violation of his employer's policy.²² In 2004, the appeal board reversed an unfavorable decision against a 50-year-old applicant with a 28-year history of regular, although occasional, marijuana use culminating in his arrest for drug-related criminal conduct.²³ So compared with the facts of these cases, Applicant's youthful and infrequent marijuana use is relatively minor or insignificant when viewed in the big picture.

Applicant has not used marijuana since August 2005, more than two years ago, and he is no longer in the environment where his marijuana use occurred. At the hearing, I found Applicant to be sincere, honest, and credible, and I found him to be embarrassed and humiliated for being called

¹⁸ MC 1 is "the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment."

¹⁹ MC 2 is "a demonstrated intent not to abuse any drugs in the future, such as (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation."

²⁰ ISCR Case No. 97-0803 (App. Bd. Jun. 19, 1998) (*See* administrative judge's decision for underlying facts and circumstances).

²¹ ISCR Case No. 98-0675 (App. Bd. Nov. 16, 1999) (*See* administrative judge's decision for underlying facts and circumstances).

²² ISCR 98-0611 (App. Bd. Nov. 1, 1999) (*See* administrative judge's decision and remand decision for underlying facts and circumstances).

²³ ISCR Case No. 02-08032 (App. Bd. May 14, 2004) (*See* administrative judge's decision for underlying facts and circumstances).

on the carpet for his conduct. He candidly acknowledged his 2005 marijuana use was a stupid decision; indeed, he was quite foolish. He now understands and fully appreciates that any illegal or improper drug involvement is inconsistent with holding a security clearance. To sum up, I am persuaded that his marijuana use is a thing of the past and is unlikely to recur.

Personal conduct under Guideline E²⁴ includes issues of false statements, credible adverse information that may not be enough to support action under any other guideline, and other personal conduct of concern. In particular, a security concern may arise due to “[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] raise questions about an individual’s reliability, trustworthiness, and ability to protect classified information.”²⁵

The issues here have, somewhat, been discussed under Guideline H. Nevertheless, the record evidence raises a security concern under Guideline E as well based on his marijuana use in August 2005 when he was in Amsterdam. It took place after he submitted a security-clearance application in 2003 and had been granted a clearance in 2004. Also, it took place after he executed a job application in 2005 with a defense contractor and in doing so agreed to a pre-employment drug screen. Taken together, these circumstances fall within the meaning of DC 5²⁶ of the guideline, because engaging in such conduct, as a clearance holder, while in a foreign country created a potential to vulnerability.

In mitigation, Applicant has reduced or eliminated any potential to vulnerability within the meaning of MC 5²⁷ of the guideline. He has done so by abstaining from marijuana use for more than two years and by demonstrating his intent not to use marijuana in the future as discussed above. In addition, he has reduced or eliminated any potential to vulnerability by disclosing his history of marijuana use. Indeed, he revealed his August 2005 marijuana use to his employer before his start date with the company. It is possible that the government would have never discovered his August 2005 marijuana use but for his self-reporting and he should be credited for having the integrity to do so. He recognizes his actions were stupid and now understands and appreciates that any illegal or improper drug involvement is inconsistent with holding a security clearance. His youth and inexperience, at age 22 a few months out of college, likely influenced his poor judgment. The outcome here may be different if Applicant was a 45-year-old man with a clearance for many years. Given all the circumstances, the likelihood of similar personal conduct is assessed as remote.

²⁴ Revised Guidelines at pp. 10–12 (setting forth the disqualifying and mitigating conditions).

²⁵ Revised Guidelines at p. 10.

²⁶ DC 5 is “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security service or intelligence service or other group.

²⁷ MC 5 is “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.”

To conclude, after weighing the record evidence as a whole, Applicant has explained, extenuated, or mitigated the drug involvement and personal conduct security concerns. And Applicant has overcome the case against him and satisfied his ultimate burden of persuasion to obtain a favorable clearance decision. Accordingly, both guidelines are decided for Applicant.

FORMAL FINDINGS

_____ SOR ¶ 1–Guideline E: For Applicant

Subparagraphs a–b: For Applicant

SOR ¶ 2–Guideline H: For Applicant

Subparagraphs a–b: For Applicant

DECISION

_____ In light of all the circumstances, it is clearly consistent with the national interest to grant or continue eligibility for security clearance for Applicant. Clearance is granted.

Michael H. Leonard
Administrative Judge